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Supreme Court of the United States

October Term, 1952

No. 616

MORRISTOWN TRUST CO., as Executor of the Last Will and Testament of Henry W. Williams, deceased,

Petitioner,

—against—

JOHN E. MANNING, United States Internal Revenue Collector for the Fifth District of New Jersey,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Morristown Trust Co., as Executor of the Last Will and Testament of Henry W. Williams, deceased respectfully prays that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Third Circuit which affirmed the judgment of the United States District Court for the District of New Jersey.

Opinions Below

The opinion of the District Court (R. 63a) is reported in 104 F. Supp. 621 (D. N. J. 1951). The opinion of the

Court of Appeals is reported in 200 F. 2d 194 (3rd Cir. 1952).

Jurisdiction

The judgment of the Court of Appeals was entered on November 26, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254.

Questions Presented

1. Must a court in a suit for refund of estate taxes based upon admittedly proper deductions not previously allowed permit the Commissioner to set off a claim based on other grounds, notwithstanding the fact that assessment of additional estate taxes on those grounds is barred by the statute of limitations, and that the equitable considerations are overwhelmingly in the taxpayer's favor?

2. Does such a set-off, even if granted, permit the Commissioner to do more than redetermine the taxpayer's estate tax liability on the basis of the then existing law?

Statement

Henry W. Williams died on January 30, 1936. The petitioner, as executor of his estate filed the estate tax return on December 29, 1936 and paid the estate tax of $24,583.07 shown to be due. In his return petitioner claimed deductions for executor's commissions, attorneys fees, administrative expenses, etc.

When the return was audited the Commissioner of Internal Revenue disallowed these deductions because the

amount thereof had not yet been definitely determined. On the basis of the disallowance of these deductions and the inclusion in the gross estate of seven joint and survivor annuity contracts purchased after March 3, 1931, the Commissioner on September 13, 1939 determined a deficiency of $17,016. The petitioner paid this deficiency on May 1, 1940.

After the amount of these commissions, fees, expenses, etc. had been duly fixed and determined in the New Jersey Probate Court, petitioner submitted proof thereof to the Commissioner of Internal Revenue and requested a refund of $9,379.81, the portion of the total deficiency which had resulted from the disallowance of the deduction of these items.

The Commissioner, however, in a letter dated October 26, 1942, although approving the deductions claimed, refused to make the refund on the ground that a redetermination of the entire tax showed there had been an underpayment rather than an overpayment. He reached this conclusion by asserting for the first time that the value of thirty-two joint and survivor annuity contracts purchased prior to March 3, 1931 (hereinafter sometimes called "pre-1931 annuities"), which annuities had been thoroughly examined when the return was audited in 1939, should have been included in the gross estate. No assessment of additional estate taxes could be made by the Commissioner at the time he denied the refund because the three-year limitation period prescribed by Section 874 (a) of the Internal Revenue Code had long since elapsed.

When this case came on for trial in 1951 the Commissioner defended solely on the ground that the pre-1931 annuities should have been taxed. The District Court with-

out exercising any discretion permitted him to assert this defense, and thus reached the substantive issue whether these annuities were in fact taxable. It decided this issue in favor of the Commissioner. The Court of Appeals affirmed on the opinion of the District Court.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court of Appeals that the right to recoupment or set-off is automatic and is not discretionary with the Court is in conflict with applicable decisions of this Court and with the decision of the Court of Appeals for the Sixth Circuit in *Routzahn* v. *Brown*.

In this case the Commissioner is seeking to oppose Morristown Trust's suit for refund, not by challenging the validity of the deductions asserted, but by contending that the pre-1931 annuities should have been included in the gross estate. The Commissioner now makes this contention despite the fact that during the three year period following the filing of the estate tax return—the period fixed by Section 874 (a) of the Internal Revenue Code as that within which a deficiency must be asserted—the Commissioner through his agent thoroughly examined these annuities and determined that they were not taxable. It was not until October, 1942, nearly three years after the time limitation had run against the Commissioner's affirmative assertion of a deficiency based upon these annuities, that he conceived their taxability as a defense to the Morristown Trust's refund claim.

A suit for refund of taxes erroneously paid, although an action at law, is equitable in its function and is controlled by equitable principles. *Stone* v. *White,* 301 U. S. 532 (1937); *Van Antwerp* v. *United States,* 92 F. 2d 81 (9th Cir. 1937). "[Such a suit] is often called an equitable action, and is less restricted and fettered by technicalities and formalities than any other form of action. It aims at the abstract justice of the case * * * ". *United States* v. *Jefferson Electric Co.,* 291 U. S. 386, 402 (1934).

While this Court held in *Lewis* v. *Reynolds,* 284 U. S. 281 (1932), that when a taxpayer sues for a refund, the Commissioner has the right to defend by redetermining the entire tax liability in order to establish that the taxpayer has not over-paid his tax, the Commissioner's right to this defense, like the taxpayer's suit for refund, is circumscribed by equitable principles. *Amy E. duPont* v. *United States,* 28 F. Supp. 122 (D. Del. 1939). "Such defense is equitable, comparable to equitable recoupment or in diminution of the plaintiff's right to recover * * * " *Routzahn* v. *Brown,* 95 F. 2d 766, 769 (6th Cir. 1938).

Routzahn v. *Brown,* just as the instant case, involved a claim for refund of estate taxes and an attempt on the part of the Commissioner to defend by contending that a redetermination of the entire tax liability disclosed no overpayment. As in the instant case the redetermination was grounded upon the inclusion in the gross estate of items for which no additional taxes could be assessed because of the bar of the statute of limitations, and which had not been considered taxable by the Commissioner upon the original audit. The Court of Appeals refused to allow the Commissioner to assert this defense since in the circumstances involved the equities were in favor of the taxpayer.

The Court candidly considered the holding of this Court in *Lewis* v. *Reynolds* but concluded that it had the discretionary power to deny this defense to the Commissioner where the equities required it. In *Amy E. duPont* v. *United States, supra,* the District Court reached precisely the same conclusion.

Although the court below recognized that "the application of the doctrine in *Lewis* v. *Reynolds, supra,* may otherwise be governed by equitable considerations" it felt constrained to permit the Commissioner to assert this defense, despite the fact that this produced what the court admitted was a "harsh result" having "no justifiable basis." Opinion of Judge Forman (R. 74a).

It is the petitioner's contention that the court below erred in automatically permitting the Commissioner to raise the annuity issue as though this were a legal right, and in refusing altogether to exercise its discretion or to weigh the equitable factors in favor of the taxpayer which dominate this case.

The defense asserted by the Commissioner partakes of the nature both of the ancient equitable doctrine of recoupment and of set-off, a more recent outgrowth of the old recoupment remedy. See, McConnell, *The Doctrine of Recoupment in Federal Taxation,* 28 Va. L. Rev. 577 (1942). The Court of Appeals for the Sixth Circuit has stated that such a defense is based on recoupment rather than set-off, since "there is no counter-demand on him [the plaintiff], but merely a denial of his equitable right to the overpayment." *Routzahn* v. *Brown, supra,* at p. 769. This Court has indicated, however, that recoupment is only available where the defense is based upon the same transaction, *i.e.,* the same

operative facts as the plaintiff's claim. *Rothensies* v. *The Electric Storage Battery Co.*, 329 U. S. 296 (1946). Since the defense which the Commissioner asserts here in evasion of the statute of limitations is in no way based upon the same transaction as the petitioner's claim, it appears that this defense is broader than recoupment and must in some measure be based upon set-off.

It is not necessary, however, to argue at length in this petition the distinction between these remedies for it is clear that the same policy considerations of justice and equity underly both.

II.

The inequities in the Commissioner's position are such that the lower courts should have exercised their discretionary power to deny him an equitable remedy.

This Court has clearly indicated that the policies underlying limitation statutes are important in tax cases and that these statutes must not be circumvented even by resort to recoupment or set-off unless there are the most compelling reasons for doing so. In *Rothensies* v. *The Electric Storage Battery Co.*, 329 U. S. 296, 301 (1946), this Court, criticizing the Court of Appeals' extension of the scope of the recoupment remedy beyond the single transaction rule, stated:

> "It probably would be all but intolerable, at least Congress has regarded it as ill-advised to have an income tax system under which there never would come a day of final settlement * * * Hence, a statute of limitation is an almost indispensible element of fairness as well as of practical administration of an income tax policy.

> "* * * The theory [of limitation statutes] is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them."

While *Lewis* v. *Reynolds* allows the Commissioner under some circumstances to circumvent the bar of the statute of limitations and thereby raise as a defense "stale claims" having no factual relationship to the plaintiff's suit, clearly this rule should not apply where allowance of the defense would produce an inequitable result.

In this petition we have deemphasized the issue of the substantive validity of the Commissioner's defense because it involves many intricacies of the Technical Changes Act, c. 720, 63 Stat. 891, in which Congress sought to eliminate any retrocative effect of this Court's decisions in the *Church* and *Spiegel* cases. A brief consideration, however, must be given to the substantive issue, for the technical nicety upon which the conclusion of the lower courts depends makes pointedly apparent the inequity in permitting the Commissioner to raise this defense.

When the taxpayer's return was audited in 1939, the pre-1931 annuities were carefully examined by the Commissioner and he determined that they were not taxable in view of the then clearly established law. In several key cases in which the Commissioner had acquiesced, it had been held that the taxability of pre-1931 joint and survivor annuities was governed by the rule laid down by this Court in *May* v. *Heiner*, 281 U. S. 28 (1930), namely, that property should not be included in a decedent's estate simply by reason of his retention of a life interest. *Chemical Bank*

and Trust Co., 37 B. T. A. 535 (1938), *appeal dismissed without opinion* (2d Cir. 1939) (acquiesced 1939-1 Cum. Bull. 29); *Hariot Reynolds Schultz*, 38 B. T. A. 59 (1938) (acquiesced 1939-1 Cum. Bull. 31).

Helvering v. *Hallock*, 309 U. S. 106 (1940), did not disturb this rule. Though the Tax Court held to the contrary in the annuity decision of *Mary H. Hughes*, 44 B. T. A. 1196 (1941) that decision was promptly overruled by *Edward E. Bradley*, 1 T. C. 518 (1943), affirmed sub nom *Washington Trust Co.* v. *Commissioner*, 140 F. 2d 87 (2d Cir. 1944), which established that the *Hallock* case did not impliedly overrule *May* v. *Heiner*. See numerous other cases to the same effect compiled in Mr. Justice Burton's dissenting opinion in *Commissioner* v. *Church's Estate*, 335 U. S. 632 (1949).

These key annuity cases still represented the controlling law when in 1942, the Commissioner first raised the annuity issue nearly 6 years after the petitioner had filed the estate tax return. Under these cases, therefore, the Commissioner's only defense to petitioner's refund claim was invalid. Had this case come on for trial at any time prior to this Court's 1949 reversal of *May* v. *Heiner* in *Commissioner* v. *Church's Estate*, 335 U. S. 632, there is no doubt that the substantive question would have been decided adversely to the Commissioner. When the issue was finally litigated it was solely on the ground of the *Church* case that the lower courts held these pre-1931 annuities taxable.

The Commissioner did also contend that the annuities were taxable under the *Hallock* case by virtue of the survivorship contingency but this point was effectively disposed of in petitioner's reply brief to the Court of Appeals which relied chiefly upon *Reinecke* v. *Northern Trust Co.*,

278 U. S. 399 (1929), *Commissioner* v. *Kellogg*, 119 F. 2d 54 (3rd Cir. 1941), and *Commissioner* v. *Irving Trust Co.*, 147 F. 2d 946 (2d Cir. 1945).

In the courts below, petitioner showed conclusively from references to the Congressional hearings that Congress intended to eliminate all retroactive effects of the *Church* decision. (See *e.g.*, excerpts from Senate and Conference Reports in 1949-2 Cum. Bull. 293, 294, 300.) That the lower courts recognized this is shown by the following passage from the opinion of the District Court:

> " * * * an overall reading of the Committee Report generally lends credence to plaintiff's contentions [that a limitation of the Technical Changes Act to estates of decedents dying after February 10, 1939 is inconsistent with the primary Congressional intention not to apply the Church case retroactively at all] and, admittedly, there does not appear to be any justifiable basis for applying the Church doctrine retroactively only to decedents dying prior to February 11, 1939 * * * " (R. 71a).

Nevertheless, the sole justification given for the "harsh result" reached by the Court was that the limiting date of February 10, 1939 created a statutory loophole, however unanticipated, and that the court was required to construe the statute strictly. As the court stated, " * * * we cannot ignore the specific limitation in the statute even for the exigency of a hard case" (R. 74a).

The only basis for Congress' reference to February 10, 1939 was that that was the date of the enactment of the Internal Revenue Code. Congress apparently never conceived that any cases involving estates of decedents dying before that date would still be pending. That Congress

intended nothing significant by the reference to February 10, 1939 is evidenced by the amendment in Section 607 of the Revenue Act of 1951 which pushed this limiting date back to March 18, 1937 upon its being brought to Congress' attention that the Commissioner was placing some reliance upon it.

Prior to the passage of the Technical Changes Act the Commissioner had of his own volition on September 6, 1949 in Treasury Decision 5741, 14 Fed. Reg. 5536 (now incorporated in Treasury Regulation 105, Sec. 81.17), ruled that he would not apply the *Church* case to estates of decedents who died before the case was decided. The lower courts held, however, that this ruling of the Commissioner too is limited in its scope to estates of decedents dying after the statutory enactment of the Internal Revenue Code on February 10, 1939, and, therefore, that this ruling does not have binding force in the instant case.

But if the regulations under the Code do not apply, it seems clear that the Commissioner should be bound by Treasury Regulation 80, Art. 18, which was in effect at the time of the decedent's death, and at the time of the original audit of the return. This regulation embodied the rule of *May* v. *Heiner* and taken in conjunction with the Commissioner's acquiescences in the key annuity cases, showed clearly that the policy of the department was not to tax pre-1931 annuities. The courts below also permitted the Commissioner to disregard this regulation, relying on the *Hallock* and *Church* cases for the proposition that the Commissioner is not bound by regulations made under compulsion of judicial decisions. However, when Congress amended the Technical Changes Act in Section 607 of the Revenue Act of 1951, it made clear its intention that the Commis-

sioner should act in conformity with his old regulations for the years prior to the enactment of the Code. This expression of Congressional intent accords with the general rule that the Commissioner's regulations, while they stand, have the force of law and he has no power to disregard them. *Francisco Sugar Co.* v. *Commissioner,* 47 F. 2d 555 (2d Cir. 1931).

In the lower courts, petitioner urged an interpretation of the Technical Changes Act which would have avoided the limiting date, but while petitioner still believes, as suggested by the dissenting opinions in the *Church* case, that the urged construction is proper, it is not proposed to burden this Court with its consideration.

The inequities of the Commissioner's position in this case may now be summarized as follows:

(1) The original audit was carefully made, and the pre-1931 annuities were deliberately exempted from taxation. No attempt was made to tax them until after the statute of limitations had run.

(2) There was no justification for denying the claim for refund in 1942, in view of the clearly established state of the law with respect to joint and survivor annuities at that time.

(3) The attempted assessment is unduly discriminatory against this taxpayer. Both the law and the established policy of the Bureau at the time this return was audited were not to tax pre-1931 annuities. We doubt that the liability now asserted against this taxpayer was assessed against any other decedent dying possessed of such annuities in the same year. This Court is now asked to assist in

effecting a discrimination between this taxpayer and all others similarly situated. (See Mr. Justice Burton's dissenting opinion in the *Church* case at p. 699.)

(4) The alleged basis for the tax, if any exists, is a technicality, a statutory loophole neither intended nor foreseen, which results from a narrowly literal reading of the Technical Changes Act in defiance of expressed Congressional intention. Such a technicality cannot justify the granting of an equitable remedy.

(5) The Commissioner asks this Court to aid him in disregarding his own valid current Treasury Regulation 105, Section 81.17 (which incorporated T. D. 5741), promulgated after the *Church* decision and bearing the stamp of Congressional approval. His justification again is a technicality—that current Regulations are not strictly applicable to tax years before the adoption of the Internal Revenue Code. Yet the intention of T. D. 5741 was quite clear. Fair play required complete retroactive protection from the effects of an unexpected decision that changed the law of 18 years. The farther removed one is in time from the *Church* decision, the greater should be the immunity from its effects, rather than the reverse. But the Commissioner's position is that under his Regulation the effects of the *Church* decision are wiped out for the preceding 10 years, and are then revived for the years before that. This is an unreasonable and unfair position.

(6) The Commissioner also wishes to be absolved from observing Treasury Regulation 80, Art. 18, in effect at the time of the decedent's death, and at the time of the original audit. The request may or may not be legally permissible; it is certainly inequitable. Moreover, it runs counter to Congress' intent, expressed in Section 607 of the 1951

Amendment, that the Commissioner should obey applicable regulations for early years.

(7) Congress, in drafting the Technical Changes Act with the intent of eliminating the effects of the *Church* decision completely, undoubtedly drafted it with the statute of limitations in mind. Certainly, therefore, Congress did not intend the Commissioner to retain the power to invoke a set-off in order to escape the effects of the statute of limitations, and withdraw the protection of the Act from certain taxpayers. The whole purpose of the legislation—to alleviate hardship caused by reliance upon *May* v. *Heiner*—militates against the interpretation that the Commissioner was left free to tax pre-1939 decedents, whose hardship and reliance differed in no respect from that of their longer-lived compatriots.

In conclusion it is submitted that there is an easy means of avoiding the inequitable result inherent in the Commissioner's defense. The Court is not forced to choose between the so-called "plain meaning" of the statutory language and the clearly indicated contrary legislative intent. It has only to withhold from the Commissioner a discretionary, equitable remedy with which, in the total absence of any equity, he proposes to go behind the statute of limitations.

The decisions of the lower courts disregard the statute of limitations although all the equities and legislative intent are in petitioner's favor. It cannot be that the historically equitable remedies of recoupment and set-off have thus crystalized into rigid rules of law to be mechanically applied. If that be so, the policy considerations behind the statute of limitations, which this Court has often indicated are strong and not to be disregarded save for sound counteravailing policy reasons, have suffered a serious setback.

III.

The lower courts' decisions represent an unwise extension of the set-off remedy, beyond the limits of that doctrine as applied in *Lewis* v. *Reynolds*.

Even if the lower courts were correct in holding that they lacked the discretionary power to deny the Commissioner the right to assert a defensive set-off, the petitioner is still entitled to recover on his claim for refund. For the set-off defense permits the Commissioner to do no more than recompute the estate tax liability as it existed at the time the statute of limitations expired, in accordance with the then-prevailing law. That law was the rule of *May* v. *Heiner*, as laid down by this Court, under which these pre-1931 annuities were not taxable.

Consider the argument of the Commissoner. He asks not merely to be returned to the position he was in before the barrier of the statute of limitations had fallen, but he wishes to take back with him a substantive change in the construction of the tax laws that occurred eight years later, when the *Church* case was decided.

The set-off remedy has never been—nor should it now be—permitted to do more than restore to the Commissioner the same substantive rights he enjoyed before the statute of limitations had run. It should certainly not enlarge those rights, for that would not be equitable, and it is only for equitable reasons that disregard of the passage of the statute of limitations can ever be justified.

In all previous cases where a defensive set-off was permitted by the courts, the liability established was always one that could successfully have been imposed originally under the law as it then existed.

As stated in *Lewis* v. *Reynolds,* the set-off must consist of amounts which "might have been properly assessed and demanded". In this case, it would not have been proper for the Commissioner to assess a tax upon these pre-1931 annuities at any time before the statute of limitations had run, and it was precisely because he recognized that fact that no assessment was made.

This is the first case in which an actual change in the tax law, as construed by the courts, has been retroactively applied to a period before the passage of the statute of limitations. The lower courts cited *Tait* v. *Safe Deposit & Trust Co.,* 70 F. 2d 79 (4th Cir. 1934) as a precedent for its decision. But the *Tait* case is clearly distinguishable. There the *law itself* did not change in the years between the running of the Statute of Limitations and the time that the set-off was claimed. What happened was that the Commissioner initially made an erroneous interpretation of the law which the courts later corrected.

The *Tait* case is therefore no authority for the proposition that an actual change in the law may be utilized by the Commissioner upon a set-off. It is only by recourse to the theory of judicial continuity that the instant decision can logically be justified. The court must be prepared to say that the law did *not,* in fact change; that it was always as stated in *Commissioner* v. *Church,* and that the rule of *May* v. *Heiner* was never the law, and, once over-ruled, it was as though it had never existed. Such an argument may have some validity as a philosophical concept; but it is certainly unrealistic, and has no place at all in the practical and orderly administration of the tax laws. *May* v. *Heiner was* the law in the most tangible possible way. It was applied by all the Federal Courts for a period of 18 years; it was

generally applied by the Commissioner after his promulgation of Regulation 80, Article 18; it was applied by the Commissioner in this very case upon the original audit of the return, when these pre-1931 annuities were deliberately excluded from taxation; and, finally, it was accepted and adopted as the correct interpretation of Section 302 (c) of the Revenue Act of 1926 by Congress, as evidenced by the Joint Resolution of March 3, 1931 and the Revenue Act of 1932 (dissenting opinions in the *Church* case) and by the passage of the Technical Changes Act, which was accompanied by legislative statements expressing approval of the position taken by the three dissenting Justices in the *Church* case).

The full implications of the lower court's decision are not pleasant to contemplate. The bald facts of this case are that the estate of a decedent has been subjected to a tax by virtue of a change in the law occurring eight years after the statute of limitations had run and 13 years after the decedent's death. If this decision is permitted to stand then every taxpayer who has paid an assessment under protest and has a claim for refund pending, must apprehend changes in the tax law occurring a decade or more after a return has been filed and audited in good faith. Such a state of affairs is quite inconsistent with the public policy, which underlies the statute of limitations. And the position of this court on the importance of the statute of limitations in the income tax field has been unequivocal. We refer, once again, to the language used in *Rothenzies* v. *The Electric Storage Battery Company,* 329 U. S. 296 (1946), which is quoted at pages 7, 8 of this petition.

According to the position taken by the Commissioner in this case, there not only never comes a "day of final settle-

ment", but there never even comes a day when a taxpayer can say with any assurance that he knew what set of judicial decisions governs his case, since they may not yet have been decided.

That cannot be the law. This Court should hold that the dropping of the barrier of the statute of limitations freezes the applicable substantive law as of that date, and insulates taxpayers against subsequent changes in the tax laws. The lower court's decision would undermine the statute of limitations and open the floodgates to set-off claims for bygone years, whenever a judicial tax decision has been overturned.

CONCLUSION

For the foregoing reasons the petition should be granted.

February, 1953.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 616

MORRISTOWN TRUST CO. AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF HENRY W. WILLIAMS, DECEASED, PETITIONER

v.

JOHN E. MANNING, UNITED STATES INTERNAL REVENUE COLLECTOR FOR THE FIFTH DISTRICT OF NEW JERSEY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact, conclusions of law, and opinion of the District Court (R. 63a-77a) are reported at 104 F. Supp. 621. The opinion of the Court of Appeals (R. 82-83) is reported at 200 F. 2d 194.

JURISDICTION

The judgment of the Court of Appeals was entered on November 26, 1952. (R. 83.) The petition for a writ of certiorari was filed on February 20, 1953. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether in the circumstances of this suit for an alleged erroneous exaction of estate taxes the courts below erred in following an applicable decision of this Court rendered subsequent to decedent's death.

STATUTES INVOLVED

The pertinent statutes are set forth in the Appendix, *infra*, pp. 12-16.

STATEMENT

The facts as stipulated, and as found by the District Court, (R. 63a-66a) may be summarized as follows:

The taxpayer is the executor of the estate of Henry W. Williams, who died on January 30, 1936. As such executor, the taxpayer filed an estate tax return on December 29, 1936. (R. 64a.)

The tax indicated in the return, amounting to $24,583.07, was paid by the taxpayer on April 19, 1937, and a deficiency tentatively determined by the Commissioner on September 13, 1939, amounting with interest to $19,822.17, was paid by the taxpayer on May 1, 1940. In the computation of both

the tax and the deficiency, deductions for certain executor's commissions, attorneys' fees, and miscellaneous administration expenses were not taken, and the 80 per cent credit allowable on account of New Jersey transfer inheritance taxes was not made. These deductions were not taken and this credit was not made because the amounts thereof were not determined or determinable at the time. (R. 64a.)

Subsequently, the amount of such commissions, fees and expenses was fixed and determined at $54,715.99 in the probate court of New Jersey, and the New Jersey transfer inheritance taxes were paid. On June 12, 1942, the taxpayer then filed with the Commissioner of Internal Revenue a claim for refund of an alleged overpayment of the federal estate tax. (R. 64a-65a.)

On March 21, 1944, the Commissioner approved the deductions and credit but denied the refund claim on the ground that redetermination of the estate tax, including allowance of the deductions and credit, revealed a net deficiency, amounting to $34,490.01, rather than an overpayment as claimed by the taxpayer. This deficiency resulted from inclusion in the gross estate of a previously omitted item, amounting to $199,450.91, representing the valuation of 32 annuity contracts which the decedent had purchased before his death. The figures for the valuation of the annuity contracts and for the amount of the asserted deficiency are not in dispute. (R. 65a.)

The 32 annuity contracts in question had been

purchased from various insurance companies by the decedent prior to March 3, 1931. All of these contracts were of substantially the same type—single premium, survivor annuity contracts, providing for an annual payment, or semi-annual payments, in a fixed amount, to Henry W. Williams during his lifetime and, upon his death, to his wife, Annie S. Williams, during her lifetime, if she survived him. In correspondence with the attorney for the taxpayer all of the insurance companies issuing such annuity contracts quoted the premiums which would have been charged if the annuities had been payable during the life of Henry W. Williams only. In all cases the quoted premiums were less than the premiums charged for the contracts which actually were issued. (R. 65a-66a.)

At the time of the Commissioner's final determination of an estate tax deficiency due to his inclusion of the value of the annuity contracts in the decedent's gross estate, the assessment and collection of such a deficiency were barred by the applicable statute of limitations. (R. 65a.)

Its refund claim having been denied, the taxpayer brought suit in the United States District Court for the District of New Jersey. The District Court sustained the Commissioner's position, holding that the value of the annuity contracts should have been included in the decedent's gross estate, and that, since this actually resulted in an underpayment of the tax despite the allowance of the additional deductions and credit, the tax-

payer was not entitled to a refund based on such deductions and credit, even though assessment and collection of the deficiency were barred by the statute of limitations. (R. 75a, 77a.) The Court of Appeals affirmed. (R. 82-83.)

ARGUMENT

The taxpayer apparently does not challenge the correctness of the determination of the Commissioner and both courts below that the value of the annuity contracts should have been included in the decedent's gross estate, that despite allowance of the deductions and credit upon which the refund claim was based there was an underpayment rather than an overpayment of the estate tax, and that the United States did not have money belonging to the taxpayer. Its principal contention seems to be that the courts below should not have applied the principle established by this Court in *Lewis* v. *Reynolds,* 284 U. S. 281, that a suit by a taxpayer for a refund of taxes may be defeated by showing that the taxpayer has not overpaid his tax. The contention is clearly without merit. The situation in the instant case is precisely the same as that which existed in the *Lewis* v. *Reynolds* case. There, as here, the statute of limitations barred the assessment and collection of the additional sum, and this Court held that that fact did not obliterate the right of the United States to retain payments already received so long as they did not exceed the amount which might have been properly assessed and demanded. Here, the payments previously received by the United States did not exceed the

amount that might have been legally assessed and demanded, and the court below was plainly correct in applying the *Lewis* v. *Reynolds* decision and denying recovery of the refund sought by the taxpayer.

Although taxpayer does not deny that the annuity contracts were properly includible in decedent's gross estate under the principle of *Commissioner* v. *Church's Estate,* 335 U. S. 632, as held by the court below, it argues (Pet. 9, 15) that it is inequitable to this taxpayer to include them because if the case had come on for trial prior to 1949, the decision of this Court in *May* v. *Heiner,* 281 U. S. 238 (overruled by the *Church* decision in 1949) would have required the substantive question whether the annuity contracts should be included in the gross estate to be resolved adversely to the United States, leaving no underpayment of taxes in 1936, and thus no basis for the application of the case of *Lewis* v. *Reynolds, supra.*[1] Taxpayer

[1] In denying the taxpayer's refund claim and in the courts below the Government has consistently maintained that there was an additional ground for requiring the value of the annuity contracts to be included in the decedent's gross estate. Thus, relying upon the principles established by this Court's decisions in *Klein* v. *United States,* 283 U. S. 231, and *Helvering* v. *Hallock,* 309 U. S. 106—as applied to annuity contracts by the Fifth, Ninth and Third Circuits, respectively, in *Commissioner* v. *Wilder's Estate,* 118 F. 2d 281, 282-283, certiorari denied, 314 U. S. 634; *Commissioner* v. *Clise,* 122 F. 2d 998, certiorari denied, 315 U. S. 821; and *Mearkle's Estate* v. *Commissioner,* 129 F. 2d 386—the Government has argued that the transfer from the decedent to his wife was contingent upon his death because the annuities continued to be payable to him and did not become payable to her or her estate unless he predeceased her. While it is true that in holding the annuities taxable the courts below did not rest their decisions upon this ground, it is also true that they did not reject it.

also refers (Pet. 8-14) to the Act of October 25, 1949, Section 7, *infra*, pp. 13-15, in which the effect of the *Church* decision was changed with respect to decedents dying after February 10, 1939, and prior to January 1, 1950, and suggests that Congress selected the date, February 10, 1939, only because that was the date of the enactment of the Internal Revenue Code, that Congress apparently never conceived that any cases involving estates of decedents dying before that date would still be pending, and that even though the Act of October 25, 1949, does not itself prevent reliance on the *Church* decision, that Act shows the inequity of applying the principle of the *Church* case to the estate of this decedent who died in 1936.

We believe, as pointed out in footnote 1, that the includibility of the annuity contracts in decedent's gross estate was warranted, not only on the ground that the decedent retained in substance income for life, but also on the basis of the philosophy of *Klein* v. *United States*, 283 U. S. 231, and *Helvering* v. *Hallock*, 309 U. S. 106, without benefit of the *Church* decision. However, even if it be assumed, *arguendo*, that the retention of income for life is the sole ground for including the annuity contracts in the decedent's estate, the courts below were justified in their reliance upon the *Church* decision.

The *Church* case involved a trust created in 1924, and this Court held that the decedent having reserved the income from the trust property for life, the trust was a transfer, within the meaning of Section 811(c) of the Internal Revenue Code, "in-

tended to take effect in possession or enjoyment at or after his death". This phrase has appeared in the federal revenue statutes since the first estate tax law in 1916, and makes the *Church* decision applicable here.

In the absence of Congressional action restricting the application of this Court's decisions, the lower federal courts are bound to apply the law as interpreted by this Court. This principle applies even though the decision of this Court is rendered after the case is on appeal. *Hormel* v. *Helvering,* 312 U. S. 552; *Helvering* v. *Richter,* 312 U. S. 561. It applies, *a fortiori,* where the decision of this Court is rendered prior to entry of judgment in the trial court. See also *Vandenbark* v. *Owens-Illinois Glass Co.,* 311 U. S. 538.

In the Act of October 25, 1949, Section 7, Congress did restrict the application of the *Church* decision with respect to decedents dying after February 10, 1939, and prior to January 1, 1950. In Section 607 of the Revenue Act of 1951, c. 521, 65 Stat. 452, Congress extended further relief in the case of property transferred by a decedent dying after March 18, 1937, and before February 11, 1939, by providing that the determination of whether such property is to be included in his gross estate under Section 302(c) of the Revenue Act of 1926, c. 27, 44 Stat. 9, as a transfer intended to take effect in possession or enjoyment at or after his death shall be made in conformity with Treasury Regulations in force at the time of his death.

Since the decedent here died in 1936, this legislation by its terms fails to touch the present case.

The court below correctly held that the specific limitation in the statute may not be ignored even for the exigency of a hard case (R. 74a). This seeming harshness disappears if, as we contend, the joint survivorship annuities purchased prior to March 4, 1931, would have been includible in the gross estate prior to the *Church* decision, a point not reached below.

No conflict exists, as alleged (Pet. 5-6), between the present case and *Routzahn* v. *Brown,* 95 F. 2d 766 (C.A. 6th). In that case the Commissioner had denied a taxpayer's refund claim on the sole ground that inclusion in the decedent's gross estate of certain property which had previously been erroneously omitted resulted in an underpayment rather than an overpayment of the estate tax. This was the only contested issue when the case was first tried. A judgment in favor of the taxpayer was reversed by the Court of Appeals. When the case again reached the District Court, the Collector was allowed to amend his answer to assert that other items of property should have been included in the decedent's gross estate. When by a subsequent motion the Collector again sought leave to amend his answer, his motion was denied. On appeal the Sixth Circuit merely held (p. 771) that the District Court had not abused its discretion in denying the Collector's motion. The Court of Appeals also pointed out (pp. 771-772) that, if the appeal should be decided on the merits, the Collec-

tor still could not prevail because none of the items of property should have been included in the decedent's gross estate. Thus, the Sixth Circuit's decision in *Routzahn* v. *Brown, supra,* like that of the District Court in *Dupont* v. *United States,* 28 F. Supp. 122 (D. Del.), turned solely on a question of pleading, both courts holding that the Government was precluded from urging issues which, because of the Government's failure to make timely amendments to its answer, were not framed by the pleadings. That problem is not involved in the case at bar.

The cases of *Stone* v. *White,* 301 U. S. 532, rehearing denied, 302 U. S. 639, and *Rothensies* v. *Electric Battery Co.,* 329 U. S. 296, involved the question of recoupment of one tax against another. The present case does not involve such a recoupment, but the question whether a taxpayer may recover a tax where it has not been shown that the tax has been overpaid.

CONCLUSION

The decision below is correct. There is no conflict of decisions and no question of importance is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APRIL, 1953.

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated— * * *

* * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

* * * * *

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 803. FUTURE INTERESTS.

Section 302(c) of the Revenue Act of 1926, as amended by the Joint Resolution of March 3, 1931, is amended to read as follows:

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any pe-

riod which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money worth. * * *"

* * * * *

Act of October 25, 1949 (Technical Changes Act), c. 720, 63 Stat. 891:

SEC. 7. TRANSFERS TAKING EFFECT AT DEATH.

(a) Section 811(c) of the Internal Revenue Code (relating to transfers in contemplation of or taking effect at death) is hereby amended to read as follows:

"(c) *Transfers in Contemplation of, or Taking Effect at, Death.*—

"(1) *General Rule.*—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise—

* * * * *

"(B) under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the

possession or enjoyment of, or the right to the income from, the property * * *, or

"(C) intended to take effect in possession or enjoyment at or after his death.

"(2) *Transfers Taking Effect at Death—Transfers Prior to October 8, 1949.*—An interest in property of which the decedent made a transfer, on or before October 7, 1949, intended to take effect in possession or enjoyment at or after his death shall not be included in his gross estate under paragraph (1) (C) of this subsection unless the decedent has retained a reversionary interest in the property, arising by the express terms of the instrument of transfer and not by operation of law, and the value of such reversionary interest immediately before the death of the decedent exceeds 5 per centum of the value of such property. For the purposes of this paragraph, the term 'reversionary interest' includes a possibility that property transferred by the decedent (A) may return to him or his estate, or (B) may be subject to a power of disposition by him, but such term does not include a possibility that the income alone from such property may return to him or become subject to a power of disposition by him. * * *"

* * * * *

(b) The amendment made by subsection (a) shall be applicable with respect to estates of decedents dying after February 10, 1939. The provisions of section 811(c) of the Internal

Revenue Code, as amended by subsection (a), shall (except as otherwise specifically provided in such section or in the following sentence) apply to transfers made on, before, or after February 26, 1926. The provisions of section 811(c) (1) (B) of such code shall not, in the case of a decedent dying prior to January 1, 1950, apply to—

(1) a transfer made prior to March 4, 1931;
* * *

(26 U. S. C. 1946 ed., Supp. III, Sec. 811).

Revenue Act of 1951, c. 521, 65 Stat. 452:

SEC. 607. TRANSFERS CONDITIONED UPON SURVIVORSHIP.

In the case of property transferred by a decedent dying after March 18, 1937, and before February 11, 1939, the determination of whether such property is to be included in his gross estate under section 302 (c) of the Revenue Act of 1926 (44 Stat. 70) as a transfer intended to take effect in possession or enjoyment at or after his death shall be made in conformity with Treasury Regulations in force at the time of his death.

SEC. 609. TRANSFERS TAKING EFFECT AT DEATH.

Effective with respect to estates of decedents dying after February 10, 1939, section 7 (b) of the Act entitled "An Act to amend certain provisions of the Internal Revenue Code," approved October 25, 1949 (63 Stat. 895), is hereby amended by striking out the word

"sentence" and inserting in lieu thereof "two sentences" and by inserting immediately preceding the last sentence thereof the following sentence: "The provisions of section 811(c)(1)(C) of such code shall not apply to a transfer made prior to September 8, 1916." The provisions of section 7(c) of such Act, as amended, shall not apply to an overpayment resulting from the application of this section.

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